3-29-2012

Resolving Arbitrability

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THE RECORDER
ESSENTIAL CALIFORNIA LEGAL CONTENT

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Resolving Arbitrability

The parties can decide who decides, but only if they make it really, really clear, explains Jon Sylvester of Golden Gate University School of Law.

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2012-03-29 11:30:51 AM

When a legal rule is imprecise, but nonetheless emphatic, I sometimes encourage my students to ask how many times the word "really" should appear in the rule statement. For example, although freedom of contract is a very powerful premise, equitable enforcement may be denied if the agreed exchange is grossly (i.e., "really, really") unfair. On the other hand, a contract may be unenforceable in its entirety if it is unconscionable (i.e., "really, really, really" unfair). I hope my students are sufficiently amused to keep paying attention, but I am also trying to make a point. "Really" is obviously not a unit of measure, but it is a common way that non-lawyers attempt to specify degrees of emphasis.

I was reminded of this by the recent opinion of the California First District Court of Appeal in Ajamian v. CantorC02e, 12 C.D.O.S. 2025. The *Ajamian* case involves the controversial subject of mandatory, binding arbitration clauses included in contacts of adhesion. It addresses a critically important question: what makes some such clauses unconscionable and therefore, unenforceable? More specifically still, it focuses on a question that, perhaps more than any other, captures the gist of the public policy debate about privatizing dispute resolution: who should decide what is unconscionable, the arbitrator or a court? More about the opinion later; first, a more general question.

WHY IS THERE SO MUCH LITIGATION ABOUT ARBITRATION?

Arbitration is intended to avoid litigation, and in a tremendous number of cases, it succeeds. It may seem ironic, therefore, that arbitration is itself the subject of so much litigation. Contractual arbitration provisions that are actually negotiated between parties of comparable bargaining power are not particularly controversial. The modern policy debate and the litigation have focused almost entirely on mandatory, binding arbitration provisions in contracts presented, on a "take it or leave it" basis, by businesses to consumers and by employers to employees.

Even when included in such contracts of adhesion, however, arbitration provisions are generally enforceable except on such grounds as would make any contract unenforceable. That question has been settled by the U.S. Supreme Court, but the battle has continued with respect to subsidiary topics often involving the content of arbitration provisions. These have included class action waivers, limitations on remedies and/or discovery, shortened statutes of limitations, incorporation-by-reference of arbitration rules that are not actually provided to the adhering party, asymmetrical retention of rights by the party who drafted the clause, the availability and scope of judicial review of the arbitral award, etc.

Fairness between the parties in any given case, however, is only part of what is at stake, and it may not be the most important part. Arbitration brings into conflict some ideas that are very basic to our system. One such idea involves party autonomy and freedom of contract. It is a foundational premise of our economy, and is deeply embedded in our legal system. So, if parties want to contract regarding the question what will happen if a dispute arises between them, so be it. After all, in our system, any deal that is not prohibited is presumptively permitted.

On the other hand, even the resolution of an entirely private dispute is not an entirely private matter. Parties can no longer

legally agree to settle their disputes by dueling. Every modern state has a judicial system and a keen interest in the legitimacy of peaceful dispute resolution, and modern concepts of fairness and the rule of law prohibit even many nonviolent forms of private dispute resolution.

This is why the widespread privatization of civil dispute resolution is such a big deal — not just to the myriad individuals who sign (or "click") away their rights to their respective days in court — but to society as a whole. And the question, "Who decides whether a provision is unconscionable and therefore unenforceable?" is not just strategically important to the parties because it arises early and could be a game-ender; it also has much broader significance because it leads directly to the implementation of public policy — not in theory but in fact.

The seemingly endless waves of court cases about arbitration are not just evidence of the effort to find an appropriate balance and mark the boundary between the private and the public; they are the effort itself. Parties resisting enforcement of arbitration provisions most frequently attack them as unconscionable. The doctrine of unconscionability has figured disproportionately in this effort because it is one of the relatively few grounds on which arbitration provisions can be challenged, despite their presumptive validity under the Federal Arbitration Act and the pertinent decisions of the U.S. Supreme Court.

If only a portion of the arbitration provision is found to be unconscionable, then the inquiry turns to whether the unconscionable part can be excised or "severed" from the provision, leaving the rest of the provision enforceable — or whether the entire arbitration provision should be thrown out. These are obviously critical determinations; so, too, then is the question who makes them. And all this takes on special importance because there is no objective (or even clear) definition of unconscionability. The fact that unconscionability is undefinable is said to be both a strength and a weakness because it leaves so much to the decision maker.

California courts have been particularly active in using the doctrine of unconscionability to police adhesive arbitration agreements. This background may help to explain the *Ajamian* opinion, in which the court of appeal held that an arbitration provision may effectively delegate to the arbitrator the issue of the provision's enforceability — if the provision meets the "heightened standard" of showing by "clear and unmistakable" evidence that the parties intended to delegate this issue to the arbitrator.

THE 'AJAMIAN' DECISION

Lena Ajamian sued her former employer alleging sexual discrimination, sexual harassment, retaliation and certain other statutory violations. The employer moved to dismiss the suit and to compel arbitration pursuant to a provision in an employment agreement. Ajamian opposed the motions alleging, among other things, that the provision was unconscionable. Issues for the trial court included unconscionability, severability and the potential applicability of a second arbitration provision included in an employee handbook. First, however, the court had to decide who should make these decisions. This brief comment focuses only on the last of these issues: whether the arbitrator or a court should decide the "threshold" question whether an arbitration provision is unconscionable and therefore unenforceable.

The arbitration provision in *Ajamian* read as follows:

"Any disputes, differences or controversies arising under this agreement shall be settled and finally determined by arbitration. ... It is expressly agreed that arbitration as provided herein shall be the exclusive means for determination of all matters arising in connection with this agreement and neither party hereto shall institute any action or proceeding in any court of law or equity other than to request enforcement of the arbitrator's award hereunder. The foregoing sentence shall be a bona fide defense to any action or proceeding instituted contrary to this agreement."

Most readers of the above-quoted language would probably conclude that the arbitrator was supposed to decide everything. The trial court, however, held that the question whether the arbitration provision was unconscionable was properly decided by the court.

The court of appeal affirmed in a 40-page opinion noting early on that the employment agreement was not the product of negotiation. After describing the facts and the procedure below, the opinion went on to discuss the Federal Arbitration Act and some U.S. Supreme Court opinions that are often cited in support of arbitration generally and the power of arbitrators in particular. The court of appeal said the following about the contract language quoted above:

"It is true that one reasonable inference from this language is that the parties ... intended that even threshold issues of unconscionability would be decided by the arbitration panel. But another reasonable inference is that all of this language is only intended to bring within the exclusive scope of arbitration all substantive disputes ... while the enforceability of the arbitration provision itself remains a matter for determination by a court... . In light of the possibility of these two conflicting inferences, the language fails to meet the test of clear and unmistakable evidence."

The practice point is pretty obvious: If you are drafting an arbitration clause and you really want to stay out of court until it is time to confirm and enforce the arbitral award, be sure to list explicitly all of the powers you want the arbitrator or arbitration panel to have, and to itemize the threshold questions you want to empower it to decide.

The *Ajamian* decision, however, also points to another basic issue concerning contract interpretation.

THE FICTION OF 'THE PARTIES' INTENT'

It is often said that "the paramount goal in contract interpretation is to ascertain the intent of the parties." In the days before standardized contracts (when so many cases seemed to involve farmers selling cows), this mantra led to the fiction that terms supplied by the court were actually "implied" by the parties. Nowadays, however, the disconnect between that old slogan and reality is far greater.

Modern adhesion contracts apply to the classes of consumers, employees, investors and patients who adhere to them after presentation on a "take it or leave it" basis. It has been said that their broad application and the absence of negotiation makes them less like traditionally conceived contracts and more like local ordinances. They do not state what the parties intended; they state what the drafter intended. Parties who draft arbitration provisions and insert them in contracts of adhesion usually want to stay out of court because doing so tends to reduce overall dispute resolution costs.

Notwithstanding the reference to what "the parties ... intended" in the above-quoted portion of the opinion, the California courts' history of efforts to police potentially abusive arbitration provisions seems based in significant part on the recognition that these provisions are seldom actually "agreed to." California courts are prevented from rejecting these adhesive clauses out of hand, however, because federal law remains relatively pro-arbitration. California courts assert the state's public policy indirectly, but this approach works only until the drafters revise their arbitration clauses accordingly. You can still take those threshold policing questions away from the courts; you just have to be really, really clear about it.

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